ultimate merits of the controversy. The scope of the decision is to deny the power of the trial court to require the fund in litigation to be paid into court until after the defendant's liability therefor has been ascertained and determined in the usual manner, but it extends no farther.

It follows from these views that the decree complained of is erroneous, and must be reversed and annulled. *Reversed.*

NOTE.—The single point decided in this case is, that a court of chancery should not require a trustee to pay money into court to abide the event, before his liability has been adjudicated, save where the liability is not contested.

The rule seems sound enough, but it would appear to be subject to the qualification that although the defendant does contest his liability, yet if his pleadings disclose a defense which is no answer to the plaintiff's claim, then an order for payment into court should go. If, for example, the defendant in the principal case had admitted that he shared in one-half the commissions of the real estate agents who sold the trust property for him, under a secret contract for commissions with such agents, as charged in the bill, but had asserted a right, as a matter of law, so to share in the commissions without accountability to the beneficiaries, then such an order for payment into court would appear proper. This was evidently the theory upon which the lower court acted. As a matter of fact, however, the trustee's admission did not go quite so far. He admitted the receipt of one-half of the commissions, but denied any contract to that effect with the agents—alleging that after the transaction was over, the agents generously presented him with $5,000. This admission may leave him a slender margin of defense, but still probably a defense if established to the satisfaction of the court. A gift to a trustee, of a part of his commissions by an agent employed and paid out of the trust fund, may be suspicious, but we imagine it does not exclusively establish bad faith. On this ground, the ruling of the court on appeal seems correct.

DUDLEY AND OTHERS v. MINOR'S EXECUTOR.*

Supreme Court of Appeals: At Richmond.

December 4, 1902.

1. FRAUDULENT MISREPRESENTATIONS—*Facts—Opinions.* A misrepresentation, the falsity of which will afford a ground of action for damages or a bill for the rescission of a contract, must be of an existing fact, and not the mere expression of an opinion. It must have been made for the purpose of procuring the contract, must be material and untrue, and

* Reported by M. P. Burks, State Reporter.

the party to whom it was made must have relied upon it and been induced by it to enter into the contract. An expressed intention to build a street railway or a hotel is not the statement of a fact, but the expression of an opinion.

2. APPEAL AND ERROR—*Record—Failure to disclose error.* If the record fails to disclose error committed by the trial court, its action will be presumed to be correct.

3. CHANCERY PRACTICE—*Fraud—Lien for purchase money—Personal decree—Collaterals—Suit on only part of collaterals.* On a bill filed by the purchaser of a lot, to enjoin a holder for value of negotiable notes given for deferred payments from collecting the same, on the ground of fraud in the procurement of the contract, if the proof fails to establish the fraud, but shows that the holder's debt exceeds the amount of the notes, the court, having all the parties before it, may at once render a personal decree against the makers for the amount of their notes, before enforcing a deed of trust given for their security, and without taking an account of the amount due the holder, although the notes were transferred, along with those of others, as collateral security for a debt. No equity exists between the makers of the different sets of notes. The holder may proceed to judgment against one set irrespective of the course taken as to others.

Appeal from a decree of the Circuit Court of Roanoke county, pronounced at its October term, 1899, in a suit in chancery, wherein the appellants were the complainants, and the appellees were the defendants. *Affirmed.*

The opinion states the case.

Green & Miller, for the appellants.

Moomaw & Woods, for the appellees.

HARRISON, J., delivered the opinion of the court.

It appears from this record that the Salem Development Company, like many other such enterprises of its day, was engaged, among other things, in buying real estate in and about the town of Salem, Va., and laying the same off into streets, avenues, and lots, for which at the time there appears to have been an unprecedented demand. On the 12th day of September, 1890, the company made second sale of lots at public auction, when the appellants, O. W. Dudley, J. A. Craddock, G. W. Bethel and Eugene Withers became the purchasers of eight lots, at the aggregate price of $9,492.50, one third of which was to be paid in cash, and the residue in two installments at one and two years. The deferred payments were

evidenced by negotiable notes executed by the purchasers to the Salem Development Company, and payable at the Farmers National Bank of Salem, Va. The notes of the appellants, payable two years after date, aggregating $3,164.14, passed finally, for full value, into the hands of A. W. Minor, of the State of New York, who held them at the time of his death, when they passed into the hands of his executor, the appellee, A. Minor Wellman. The appellee brought suit at law in the Circuit Court of Roanoke against the makers to enforce payment of these notes that had come to his hands as executor, and thereupon the bill in this case was filed by the appellants, praying for an injunction to restrain the appellee from proceeding to judgment against them upon the notes, upon the ground that they were induced to buy the lots from the Salem Development Company, and to execute the notes for the deferred payments thereon by fraudulent representations made to them by the company before, and at the time, of their purchase. A temporary injunction was granted, which was subsequently dissolved by decree of October, 1899. From this last mentioned decree the cause was brought by appeal to this court.

The representations relied on by the appellants are set forth in the petition for appeal as follows: That at the sale of lots on the 12th of September, 1890, A. M. Bowman, the president of the Salem Development Company, speaking for it, "proclaimed to the assembled bidders, among whom were petitioners, the following distinct representations of fact:

"(1) That he had a letter from Mr. Fries, President of the Southern Construction Company, assuring him that the Roanoke & Southern Railroad would enter Salem throught the lands of the Salem Development Company; that the construction of said railroad would begin at once, and that its building was an assured fact.

"(2) That a hotel would be constructed by the Salem Development Company on a certain block of lots at the cost of $50,000.

"(3) That an electric railway would be built through the company's property, and that bond had been given to complete it within two years; and

"(4) That certain other manufactories had been secured to be located on the property, and would be constructed at once."

It is further stated that, in order to encourage petitioners to bid on the lots, President Bowman declared that, unless these repre-

sentations were carried out, purchasers of lots would not be required to pay their deferred installments of purchase money.

This court has so repeatedly, in recent years, laid down the rules of law by which it must be governed in disposing of this class of cases that it hardly seems necessary to do more than cite a few of the cases bearing upon, and, in our view, conclusive of the questions raised by this appeal.

The doctrine is well settled that a misrepresentation, the falsity of which will afford a ground of action for damages, or a bill for the rescission of a contract, must be as to an existing fact. It must be an affirmative statement, or affirmation of some fact, in contradistinction to a mere expression of opinion, which ordinarily is not presumed to deceive or mislead. The statements must have been made for the purpose of procuring the contract. They must be material. They must be untrue, and the party to whom they were made must have relied upon them, and been induced by them to enter into the contract. *Wilson* v. *Carpenter,* 91 Va. 183; *Watkins* v. *West Wytheville etc. Co.,* 92 Va. 1; *Max Meadows etc. Co.* v. *Brady,* 92 Va. 71; *Orr* v. *Goodloe,* 93 Va. 263; *Grosh* v. *Ivanhoe Land Co.,* 95 Va. 161; *Owens* v. *Boyd Land Co.,* 95 Va. 560. In the light of these authorities we will now proceed to a consideration of the evidence touching the several representations relied on as furnishing ground for affording appellants relief from their obligations as purchasers of the lots in question.

The first is that A. M. Bowman stated that he had a letter from Mr. Fries, assuring him that the Roanoke & Southern Railroad would enter Salem through the lands of the company, and that its building was an assured fact. The evidence does not sustain this contention. The letter referred to from Fries to Bowman is as follows: "I write to say hurriedly that the contract arranged today with the Railway and Construction Company to build to Roanoke does not affect our coming to your place as contemplated in the proposition which was fully discussed. I am empowered to take the matter up with you. Can you come to Salem, N. C., and confer with me at once? I will be at home next week." There is nothing in this letter to justify the assumption that the building of the road in question was an assured fact, and the decided weight of evidence is that Bowman read the letter to the crowd of bidders for their information, and made no statement inconsistent with its terms. Mr. Withers, the only one of the appellants who has testi-

fied in the case, says that he is unwilling to say positively that Bowman did not have the letter in his hand, while speaking, because there was a great crowd where Bowman was standing that often shut him off partially from view. Bowman himself, and his evidence is corroborated by others, says that he read the letter, and stated that a committee would go to North Carolina to confer with Mr. Fries on the subject, and that he hoped the branch road would be brought from Roanoke to Salem, and that its depot would be located on the lands of the development company.

The second representation relied on is the alleged statement that a hotel would be built on the lands of the company at a cost of $50,000. The evidence upon this subject, as well as the language of the alleged statement itself, clearly show that it was not the assertion of an existing fact, but the mere expression of an opinion that the company would build a hotel; and no doubt it would have done so if its hopes and expectations, like those of appellants, had not so soon turned to ashes.

The third representation relied on is the alleged statement that an electric railway would be built through the company's property, and that bond had been given to complete it within two years. As a matter of fact a company had been organized, a charter obtained, and other steps taken towards building the road in question. The evidence is very conflicting, but tends strongly to support the view that Bowman did not say that bond had been given to complete the road in two years. It further appears that appellants could hardly have been affected or influenced to make their purchase by this alleged statement, because long before the expiration of the two years they had given notice of their intended defences, and determination to refuse payment of their notes, for causes that existed anterior to the time at which it is alleged the road was to be completed under the bond. Under such circumstances it can hardly be said that appellants are entitled to be released from the obligation of their purchase money notes.

The fourth representation relied on is the alleged statement that certain other manufactories had been secured to be located on the property, and would be constructed at once. To the extent that this statement is shown to have been made, it is sustained by the facts appearing of record.

In regard to the allegation that Bowman declared that, unless the alleged representations were carried out, purchasers would not

be required to pay the deferred installments, it clearly appears that this statement was made in connection, alone, with certain paving that was contemplated; that, if that paving was not done, purchasers need not pay their deferred payments. The paving was done as promised, and all obligations of the company on that account fulfilled.

Upon this branch of the case we are of opinion that no such misrepresentations of fact are proven, as would, under the principles of law adverted to, entitle the appellants to the relief sought.

The notes involved in this controversy, together with the notes of a large number of other purchasers, were endorsed by the Salem Development Company to the Farmers National Bank of Salem, Virginia, to secure about $21,000 of debt due to the Olean Cart Company. The appellants contend that it was error to decree the payment of the full amount of their notes without directing an account of the amount that was due to the appellee, A. Minor Wellman, executor, whose testator was assignee of the Olean Cart Company; and, further, that the lots embraced in the deeds of trust to secure the notes of appellants, and those of the other lot purchasers, should have been sold before decreeing a money payment by only four of the large number of debtors jointly liable.

The decree appealed from states that it appears from the record that the amount due by the appellants is not sufficient to satisfy the debt due from the Salem Development Company to the appellee. The whole of the record is not before this court, and there is nothing in that portion of it which is before us to show the statement of the decree to be incorrect. The appellants owe their purchase money. If it is not all due to the appellee, any residue would be due to the Salem Development Company, and, as the parties are all before the court, appellants could not be benefited by an account, or prejudiced by a decree for the full amount due from them. Nor was there any reason to delay appellee in his money decree against appellants until the lots were sold. No equity exists between appellants and the other purchasers of lots. Each of the appellants was liable to judgment for the amount of their joint notes irrespective of the course pursued as to others who had bought lots. The appellee might release his claim against other purchasers, and appellants would not be prejudiced thereby, and could not complain.

Upon the whole case, we are of opinion that there is no error in the decree complained of, and it must be affirmed. *Affirmed.*

NOTE.—It is an ill wind that blows nobody good. The disastrous "boom" which swept over Virginia a decade ago (well described by Judge Burks in a note to *Max Meadows Land Co.* v. *Brady*, 1 Va. Law Reg. 437), left many wrecked fortunes in its train, but the litigation following it gave opportunity to the lawyers of the State of earning many fees, and of learning well several important legal principles. Of the latter the most prominent were those governing promoters' profits, defenses to subscriptions to shares in a corporation, and fraudulent representations in the sale of real estate.

The principal case is a relic of that litigation, and involves the last mentioned of these doctrines. The principles laid down in Judge Harrison's opinion, that to constitute fraud entitling the injured party to a rescission of the contract in equity, the representation must have been of an existing fact, and not of a future fact (sometimes called a 'promissory representation'), or mere expression of opinion—that it must have been intended to induce the contract and have induced it—that it must have been material—and must have been false and injurious—have been so often reiterated by the court in recent years as to have become familiar even to the unlearned lawyer.

It will be observed that in summing up the essential ingredients of fraud in the principal case no reference is made to the *scienter*. There is still some confusion in the minds of the profession as to whether or not fraud may be established without proof of guilty knowledge. This is not surprising when the reputable courts, and standard authors, display the same confused ideas on the subject. The trouble arises from failure to distinguish between fraud in *equity*, as a ground of rescission, and fraud at *law*, when set up as a defence to an action on contract, or as the basis of an action of deceit. In the former case, as well said by Staples, J., in *Grim* v. *Byrd*, 32 Gratt. 293, 300, and repeated in numerous Virginia cases since, "the real inquiry is, not whether the vendor knew the representation to be false, but whether the purchaser believed it to be true." This rule applies also where the defendant files a special plea in the nature of set-off, under section 3299 of the Code—since by special provision of the statute equitable defenses may be made thereunder. *Guarantee Co.* v. *First Nat. Bank*, 95 Va. 480—where Judge Riely points out the distinction mentioned (pp. 490-491).

Virginia cases involving fraud at law, and therefore the question of the necessity of the presence of the *scienter*, are not numerous. *Cunningham* v. *Smith*, 10 Gratt. 255; *Mason* v. *Chappell*, 15 Gratt. 572, and *Proctor* v. *Spratley*, 78 Va. 254, are illustrations. See also *Trice* v. *Cockran*, 8 Gratt. 442, 450.

The general subject of fraud at law and in equity is discussed most satisfactorily in 2 Pomeroy's Eq. Jurisp. 885 *et seq.* The most inaccurate and confused treatment of the subject known to us is Mr. Bispham's Chapter on Fraud (Princ. of Equity, sec. 214 *et seq.*).

In the principal case—which was in equity—it will be observed that the

court incautiously couples actions at law and suits in equity together, as governed by the same rule. But as the question of fraud at law was not involved, doubtless the attention of the court was not drawn to the distinction.

Whether, at law, a false statement, honestly but recklessly made, is the legal equivalent of the *scienter*, is much disputed, particularly since the decision of the House of Lords in the famous case of *Derry* v. *Peek*, 14 App. Cases, 337, 12 Eng. Rul. Cas. 250, in which the question was answered in the negative. Some of the American courts have shown a disposition to follow this case, but most of them adhere to the rule that 'one who recklessly makes a statement of fact which is susceptible of knowledge, "takes upon himself to warrant his own belief of the truth of what he asserts, and a man who makes a representation [as to] which he neither knows nor cares whether it is true, can have no real belief in the truth of what he asserts, and is justly guilty of deception." ' 14 Am. & Eng. Enc. L. (2d ed) 98. (Cases collected *ib.* pp. 86-87, 97-100.) We know of no Virginia case in which this particular question is passed upon, but the view last presented was substantially approved *obiter* by Robertson, J., in *Mason* v. *Chappell* (*supra*), in the following statement of the rule: "To constitute fraud [at law] the *scienter* is necessary. It is not sufficient to show that false representations were made by the vendor; it must also be shown that at the time he made them, he knew them to be false; or, at the least, that they were made as statements of facts within his own knowledge, when in truth he had no knowledge whatever on the subject" (15 Gratt. p. 582).

KINZIE V. RIELY'S EXECUTORS.*

Supreme Court of Appeals: At Richmond.

December 4, 1902.

1. PLEADING—*Death of plaintiff—Revival by motion—Set-offs.* The filing of a plea or account of set-offs under chapter 160 of the Code does not deprive the personal representatives of a plaintiff who dies pending the action of the right to have the action revived in their names on motion, without notice, as provided by sec. 3308 of the Code, notwithstanding the provisions of sec. 3303, declaring that the defendant shall be deemed to have brought an action against the plaintiff for the amount of the set-off, and that the plaintiff shall not dismiss the action without defendant's consent.

2. RECOUPMENT UNDER CODE, SECTION 3299—*Breach of covenant for title.* A grantee of real estate when sued at law by his grantor for the purchase price may, under Code, section 3299, file a special plea claiming damages for a breach of warranty or covenant for title by his grantor

* Reported by M. P. Burks, State Reporter.